Supreme Court, U.S.
FILED
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No.

In the
Supreme Court of the United States

OCTOBER TERM, 1996

ANDREW MARTIN KRANYIK,
Petitioner,

v.

CITY OF WEST MELBOURNE, BRAIN LOCK,
and PAOLO DONISI,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Where excessive force by a police officer is alleged in a section 1983 suit, is the standard for qualified immunity that the exact fact pattern must have been determined in an eleventh circuit case to be unconstitutional in order for the section 1983 claim to survive a qualified immunity summary judgment motion?

2. May a single act be indicative of a policy or practice that gives rise to section 1983 liability?

PARTIES

The names of all paries to the proceenings in the court hose judgment5 is sought to be reviewed here appear in the caption of the case. Thereis no parent or subsidiary company of any party to be listed.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Andrew Kranyik, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinion of the district court in this case is reproduced at 2a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The pertinent provision of 42 U.S.C. Section 1983 is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

STATEMENT OF THE CASE

Kranyik was arrested for driving while under the influence, a non-violent misdemeanor crime. He did not resist the arrest in any way, was fifty years of age and weighed in excess of 260 pounds. Kranyik was hand-cuffed behind his back for a period of approximately three hours, while the Respondent officer waited for a mobile testing unit. Kranyik immediately notified the Respondent police officer that he was in pain as a result of the handcuffs.

The Respondent police officer had an alternative measure to conduct sobriety testing instead of keeping the Kranyik in handcuffs for more than three hours awaiting the Brevard County Sheriff Department's mobile sobriety testing unit. Donisi, however, apparently followed the City's procedures, and kept Kranyik hand-cuffed behind his back for a period of several hours.

There was no supervision of the type of handcuffs that were used by the City of West Melbourne Police Department, and officers were not given any specific instruction on how to use handcuffs by the City of West Melbourne. DONISI stated that all police officers bought there own handcuffs from various sources and that he did not know what other officers used.

DONISI stated that the policy of West Melbourne if someone complained about the handcuffs was to call an ambulance and have the subject checked.

There is a factual dispute about whether Kranyik complained about the handcuffs. DONISI stated in his deposition on several occasions that Kranyik never complained about the handcuffs. Kranyik in his affidavit states that he did complain about the pain caused by the handcuffs on several occasions while in DONISI's custody. DONISI in his arrest report,

states that Kranyik did complain of the pain from the handcuffs. Thus, there is a discrepancy in DONISI's own statements.

DONISI indicated in his deposition that there was another procedure to use if the arrested subject was obese. DONISI, however, stated that he did not know what the procedure was, and that he would have to contact a supervisor if he arrested an obese person. DONISI also stated that there were other types of hand-cuffs available, but that he was not trained to use these hand-cuffs.

It is clear that it was accepted procedure to wait for the mobile sobriety testing units, and for the city's officer's to use whatever handcuffs that they happened to have purchased.

Kranyik was diagnosed with carpal tunnel syndrome after his May 14, 1993, arrest. He had not suffered from any pain in his wrists prior to his May 14, 1993 arrest, or any other symptoms of carpal tunnel syndrome prior to this date. Dr. Weiss, who treated Kranyik, stated that Kranyik's symptoms from carpal tunnel syndrome were likely due to an acute injury.

On April 22, 1996, District Judge Anne Conway granted the Respondents' Motion for Summary Judgment, and dismissed Kranyik's complaint. Judge Conway relied on Lassiter v. Alabama A & M University, Bd. of Trustees, 28 F. 3d 1146 (11th Cir. 1994) (en banc): in her decision to grant the Respondents' Motion for Summary Judgment based upon qualified immunity. The standard set forth in the District Court's order is that the "if the case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. The line is not to be found in abstraction-to act reasonable, to act with probable cause, and so

forth-but in studying how these abstractions have been applied in concrete circumstances." id. at 1149-50.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of Kranyik's claim.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in this case to resolve the conflict with this Court's previous rulings and the Eleventh Circuit's practice of granting summary judgment based upon qualified immunity unless the exact fact-pattern has been determined to be unconstitutional in the Eleventh Circuit.

The use of a single generic standard in all claims raised under Section 1983, is contradictory to the standard that the Supreme Court established for excessive force cases in Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989). The Supreme Court has established that "in cases involving an arrest, investigatory stop, or other 'seizure" of a free citizen, the "reasonableness standard of the Fourth Amendment must apply," id. 395, 109 S. Ct. at 1871, Tennessee v. Garner, 471 U.S. 1, 105, S.Ct. 1694, 85 L. Ed. 2d 1 (1985).

The Court in Graham, specifically stated, "[W]e reject this notion that all excessive force claims brought under Section 1983 are governed by a single generic standard." Graham v. Connor, 490 U.S. at 395, 109 S.Ct. at 1871, 104 L.Ed. 2d 443 (1989).

The "reasonableness standard of the Fourth Amendment" is whether a reasonable well-trained officer in similar circumstances would have known that his actions violated the Kranyik's rights. Malley v. Briggs, 475 U.S. 335, 89 L.Ed. 271, at 281, 106 S.Ct. 1092 (1986). Under this "reasonableness"

standard, the Respondent Police officer should have known that he was violating the Kranyik's right to be free from excessive force and restraint under the Fourth and Fourteenth Amendments by keeping the over-250-pound man hand-cuffed behind his back for almost three hours after he had complained several times to the Respondent Officer.

The standard the Court of Appeals of the Eleventh Circuit is using makes is not the same standard that this Court has held must be used in determining whether qualified immunity applies in an excessive force case.

I.

WHERE EXCESSIVE FORCE BY A POLICE OFFICER IS ALLEGED IN A SECTION 1983 SUIT, IS THE STANDARD FOR QUALIFIED IMMUNITY THAT THE EXACT FACT PATTERN MUST HAVE BEEN DETERMINED IN A ELEVENTH CIRCUIT CASE TO BE UNCONSTITUTIONAL IN ORDER FOR THE SECTION 1983 CLAIM TO SURVIVE A QUALIFIED IMMUNITY SUMMARY JUDGMENT MOTION ?

Kranyik disagrees with the standard for qualified immunity that the district court set fourth in determining excessive force cases. The district court relied on Lassiter v. Alabama A & M University, Bd. of Trustees, 28 F. 3d 1146 (11th Cir. 1994) (en banc): in its decision to grant the Respondent officer Donsisi's Motion for Summary Judgment based upon qualified immunity. The standard set forth in the District Court's order is that the "if the case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. The line is not to be found in abstraction-to act reasonable, to act with probable cause, and so forth-but in studying how these abstractions have been applied in concrete circumstances." id.

This standard is contradictory to the Fourth Amendment 'reasonable' standard, under which the Supreme Court has stated that excessive force cases are to be analyzed, and this generic standard should not be adopted in all cases involving the qualified immunity defense. Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989); Malley v. Briggs, 475 U.S. 335, 89 L.Ed. 271, at 281, 106 S.Ct. 1092 (1986).

Kranyik respectfully asserts that the use of a single generic standard in all claims raised under Section 1983, is contradictory to the standard that the Supreme Court

established for excessive force cases in Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989). The Supreme Court has established that "in cases involving an arrest, investigatory stop, or other 'seizure" of a free citizen, the "reasonableness standard of the Fourth Amendment must apply," id. 395, 109 S. Ct. at 1871, Tennessee v. Garner, 471 U.S. 1, 105, S.Ct. 1694, 85 L. Ed. 2d 1 (1985).

The Court in Graham, specifically stated, "[W]e reject this notion that all excessive force claims brought under Section 1983 are governed by a single generic standard." Graham v. Connor, 490 U.S. at 395, 109 S.Ct. at 1871, 104 L.Ed. 2d 443 (1989).

The "reasonableness standard of the Fourth Amendment" is whether a reasonable well-trained officer in similar circumstances would have known that his actions violated the appellant's rights. Malley v. Briggs, 475 U.S. 335, 89 L.Ed. 271, at 281, 106 S.Ct. 1092 (1986). Under this "reasonableness" standard, the Respondent Police officer should have known that he was violating Kranyik's right to be free from excessive force and restraint under the Fourth and Fourteenth Amendments by keeping the over-250-pound man hand-cuffed behind his back for almost three hours after he had complained several times to the Respondent Officer.

Kranyik does not claim that he should not have been hand-cuffed at all, rather, he claims that in light of the circumstances of this case, the manner in which the handcuffs were used was unreasonable. In other words, it was unreasonable to keep the Kranyik hand-cuffed for such an extended period of time without at least removing the handcuffs periodically.

Respondent DONISI used excessive and

unnecessary force when he kept Kranyik's hands hand-cuffed behind his back for more than three hours, and this action was taken pursuant to the established policy and procedures of the Respondent CITY OF WEST MELBOURNE and the City's police department.

The District Court determined that Respondent Donsisi was entitled to qualified immunity, because he did not violate clearly established law.

Kranyik has claimed that the actions described above and alleged in his complaint constitute an unwarranted and unreasonable seizure under the Fourth Amendment, and a violation of his rights under the due process clause of the Fourteenth Amendment.

The Eleventh Circuit following Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982), has adopted a two-part test in analyzing a public official's motion for summary judgment based on qualified immunity. First, the public official must prove that he was acting in his discretionary capacity at the time of the alleged wrongful act. Then, the burden shifts to the Kranyik to prove that the alleged wrongful act violated clearly established at the time of the incident.

Respondents argument is that there is no clearly established law not to be hand-cuffed. Kranyik, however, is not disputing the legality of his being hand-cuffed, but is instead claiming that the manner in which the restraint was used was unreasonable under the circumstances.

The exact or even almost exact fact-pattern does not have to have been determined by an appellate court to put a police officer on notice that his actions are violating an individual's rights. In Telfair v. Gilberg,

868 F.Supp. 1396 (S.D. Ga. 1994), the a pre-trial detainee alleged that a guard had used excessive force against him. The Court used the Fourth Amendment "reasonableness" standard after determining that the prison guard was acting in his discretionary capacity. id. at 1403. Although the exact fact-pattern had not been litigated the court stated, "it requires little creativity or imagination for a reasonable jail official to guess that choking a physically handicapped detainee and knocking him over might constitute a constitutional violation." id.

This Court has found that "police use of excessive force is a constitutional violation." Mckinney v. Dekalb County, 997 f.2d 1440, 1443 (11th Cir. 1993). This Court has also found that the proper standard in determining whether qualified immunity is appropriate in a pre-trial seizure is the Fourth Amendment 'reasonableness" standard that was used in Graham. Sweat v. Bailey, 876 F.Supp. 1571 (M.D. Ala. 1995). In Sweat, the Court found that an officer who beat an arrestee after the arrestee called him an "ass", was not entitled to qualified immunity. The officer's alleged conduct in Sweat, was "not comparable to a split second decision when an officer is physically threatened. It does not take hindsight or tortured reasoning to conclude that...Messick beat Sweat without provocation, then Messick's conduct was not only malicious but summarily punitive, taking on the roles of grand jury, judge and jury to indict, try and punish Sweat." id. at 1578.

The right to be free from excessive force is a clearly established right. Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993), citing Holt v. Artis, 843 F.2d 242, 246 (6th Cir. 1988).

Excessive force claims are to be analyzed under the Fourth Amendment's objectively reasonable test. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham v. Connor, 490 U.S. 386, 394-95, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989).

The legal standard to be used in determining whether the officer is entitled to qualified immunity is whether a reasonably well-trained officer in the Respondent officer's position would have known that the manner in which the hand-cuffs were used in this particular case. Malley v. Briggs, 475 U.S. 335, 89 L.Ed 2d 271, at 281, 106 S. Ct. 1092 (1986). See also, Thompson v. City of Clio, 765 F. Supp. 1066, (M.D. Ala. 1991), quoting, Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989) (The constitutionality of any application of force against a citizen by a state official, in connection with a criminal investigation or otherwise, is judged under a fourth amendment "reasonableness" standard).

It is not necessary that an exact fact pattern that is complained of in a 1983 action have been decided by a court in order for the law to be clearly established. Instead, it has to be such conduct that a reasonable police officer would be put on notice that such conduct was unlawful.Anderson v. Creighton, 483 U.S. 635, 97 L.Ed. 2d 523, 107 S.Ct. 3034 (1987).

Anderson involved a claim by homeowners that an FBI agent's warrantless search violated their rights under the Fourth Amendment. Without any discovery having taken place, the District Court of Appeals granted the agent's summary judgment on the ground

that the search was lawful since it was based on probable cause and exigent circumstances. The United States Court of Appeals for the Eighth Circuit reversed, holding that the right that the agent was alleged to have violated--the right of persons to be protected from warrantless searches of their homes unless the searching officers have probable cause and there are exigent circumstances-was clearly established. id. at 97 L.Ed. 2d 527.

The Supreme Court vacated the Eighth Circuit Court of Appeals' decision, and remanded the case for further discovery. The Court stated in its opinion that the operation of the "objective legal reasonableness" of the officer's actions "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." id. at 97 L.Ed. 2d 530.

The Court went on to state "[I]t should not be surprising, therefore, that our cases establish the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence relevant sense...

this is not to say that an official action is protected by qualified immunity unless the very action in question has been held unlawful;...but it is to say that in the light of pre- existing law the unlawfulness must be apparent. (emphasis added) id.

The Court in Anderson, stated that the purpose of qualified immunity for government officials "is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" 483 U.S. 635, 97 L.Ed. 2d 523,534 107 S.Ct. 3034 (1987).

The Eleventh Circuit

"evaluates an excessive force claim by considering such factors as the need for using

force, the relationship between the need for using force and the amount of force used, the reason for using the force-that is whether the officer applied force with good faith or malicious intent, and the extent of the injury suffered."

Samples on Behalf of Samples v. City of Atlanta 846 F. 2d 1328, 1331,, (11th Cir. 1988).

Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993), involved im part a claim of excessive force due to hand—cuffing. In that case the court denied the Respondent's qualified immunity defense, because she alleged that she had informed the officer that she had an injured arm. The court held that there was a genuine fact issue as to whether the officer should have known that hand-cuffing the appellant in that circumstances was unreasonable and therefore excessive.

The present case presents similar facts. Kranyik was an extremely large man, who complained immediately about the pain that the handcuffs caused. He did not resist the officer and was not a threat to him. The officer kept Kranyik hand-cuffed behind his back for more than three hours when there was an adequate alternative for the sobriety testing. Kranyik also suffered permanent injury. Clearly under these facts and a reasonable officer should have known that this conduct was unreasonable and was put on notice that his conduct was violating the law.

Citizens have the right to protection from unjustified intrusions upon their physical and emotional well-being, including the right to bodily integrity. Montgomery v. City of Chicago, 670 F. Supp. 230 (N.D. Ill. 1987).

This right stems from both the due

process clause of the Fourteenth Amendment and the prohibition against unreasonable seizures found in the Fourth Amendment. Gilmere v. City of Atlanta, 774 F. 2d 1495 (11th Cir. 1985) (en banc) cert denied, 476 U.S. 115, 106 S.Ct. 1970, 90 L.Ed. 2d 654 (1986).

Kranyik acknowledges that Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993), was decided after the Kranyik's arrest. It is, however, illogical to state that it was unreasonable to inflict injury through the use of handcuffs after an officer has been put on notice that he might do so in the Sixth Circuit a few months before Kranyik's arrest; but an officer in the Eleventh Circuit is not required to possess the same common-sense to know that leaving a 260 pound man hand-cuffed behind his back for three hours might injure his wrists.

The Court in Walton, did not find that the exact fact-pattern had to have been determined to be unconstitutional by a court. It was enough that a reasonable officer would have been put on notice that his actions might injure and violate the plaintiff's rights to be free from excessive force. Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993), citing Holt v. Artis, 843 F.2d 242, 246 (6th Cir. 1988).

The law regarding the unreasonable use of force was clearly established at the time of the arrest. "The qualified immunity defense should fail if the law governing the Defendant's actions has been clearly established." Ansley v. Heinrich, 925 F.2d 1349 (11th Cir. 1991), quoting, Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982). The Respondents, therefore, were not entitled to the qualified immunity defense.

II.

MAY A SINGLE ACT BE INDICATIVE OF A POLICY OR PRACTICE THAT GIVES RISE TO SECTION 1983 LIABILITY?

Municipal employees or city council members and the like, who have final rule-making authority can make policy with just one act. Parker v. Williams, 862 F.2d 1471 (11th Cir. 1989).

In Parker, the chief jailer kidnapped and raped the plaintiff, and the plaintiff sued the county and the sheriff under Section 1983. id.

The Eleventh Circuit found the sheriff had final authority to make employment decisions, even though the county had no official policy or well-established custom regarding personnel decisions. Therefore, the sheriff's lack of a background investigation on the jailer could be ascribed to the county for section 1983 liability.
id. at 1480.

The court in Parker, stated that a single incident may be indicative of a policy or practice that may give rise to section 1983 liability. id.

"A 'municipal act' is not" ... "limited to decisions made by the city's official legislative body or written agreements. City policy may also be implicated by the acts of individual policy-making officials or by pervasive city customs." Brown v. City of Ft.Lauderdale, 923 F.2d 1474, 1477 (11th Cir. 1991).

The United States Supreme Court has held that there are "appropriate" circumstances "where a deliberate choice to follow a deliberate course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in

question." Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 1300-01, 89 L.Ed. 2d 452 (1986).

There is evidence that the Respondent city and police chief failed to adequately train and supervise its employees in the proper use of restraints. This lack of training and supervision constituted an official policy or custom of the Respondent city, and this policy or custom evidenced a deliberate indifference to Kranyik and others. This policy directly led to the injuries to Kranyik.

The Respondent officer deliberately chose to keep Kranyik's hands hand-cuffed behind his back when there was another viable alternative. Respondent officer chose this course of action even after being informed that Kranyik was in pain, and despite the fact that Kranyik had given him no resistance to his arrest for a non-violent crime. Respondent officer stated in his deposition that he took these actions pursuant to the City's policies. Respondent LOCK was the chief of police of the Respondent City, and so responsible for the supervision and training of his officers. Therefore, the Respondent city and LOCK should be liable for its policies and lack of training and supervision that led to Kranyik's injuries.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,
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APPENDIX A
ORDER OF THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 96 - 2694
Non-Argument Calendar

D. C. Docket No. 94-960-CIV-ORL-22

ANDREW MARTIN KRANIK,
Plaintiff-Appellant,

versus

CITY OF WEST MELBOURNE, FLORIDA a Florida municipality, BRIAN LOCK, Police Chief of the City of West Melbourne Police Department in his official capacity, PAOLO DONISI, individually and as a City of West Melbourne police officer,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(December 27, 1996)

Before KRAVITCH and COX, Circuit Judges, and FAY, Senior Circuit Judge

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxed against plaintiff-appellant.

1

11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based of on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury bverdict is sufficient;

(c) the order of an administrative agency is supported by substanial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is wupported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precendential value, the judgment or order may be affirmed or enforced without opinion.

_____

Deputy Clerk

APPENDIX B
MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT COURT OF FLORIDA DATED APRIL 22,1997

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

ANDREW MARTIN KRANYIK
Plaintiff,

-vs- CASE NO. 94-960-CIV-ORL-22

CITY OF WEST MELBOURNE, FLORIDA, et al.,

Defendants.
_____/

ORDER

I. INTRODUCTION

The Plaintiff, Andrew Martin Kranyik, sues the City of West Melbourne ("the City"), its police chief, Brian Lock ("Chief Lock"), and one of its officers, Paolo Donisi ("officer Donisi"), pursuant to 42 U.S.C. section 1983. Kranyik claims that Officer Donisi subjected him to excessive and unreasonable force following Kranyik's arrest for driving under the influence. More specifically, Kranyik complains of the manner

in which Officer Donisi handcuffed him, and the length of time he was left handcuffed. Kranyik maintains that the handcuffing caused him to develop bilateral carpal tunnel syndrome.

The Defendants seek summary judgement on the basis, inter alia, that Officer Donisi is entitled to qualified immunity, that Kranyik has not presented sufficient "policy or custom" evidence to impose section 1983 liability on the City, and that there is no basis for holding Chief Lock liable under the statute. After carefully considering the matter, the Court determines that Defendants are entitled to summary judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. In making this determination, the Court must view all of the evidence in a light most favorable to the non-moving party. Samples on Behalf of Samples v. city of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988). The moving party has the initial burden of establishing the absence of a genuine issue of fact. Celotex Corpl v. Catrett, 477 U.S. 317 (1986). Next, the "non-moving party...bears the burden of coming forward with sufficient evidence of every element that he or she must prove." Rollins v. Techsouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987). To that end, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.'"

Celotex, 477 U.S. at 324.

III. FACTS 1

Officer Donisi arrested Kranuyik at 10:53 p.m. on May 14, 1993, following a traffic stop. At the time of his arrest, Kranyik was 5'9" tall and weighed approximately 260 pounds. Officer Donisi handcuffed Kranyik behind his back and placed Kranyik in Donisi's patrol car.2 The handcuffs Donisi used were his personal property. After arresting Kranyik, Donisi radioed for the assistance of the Brevard County Sheriff's Department's mobile breath testing unit, commonly referred to as the "BAT Mobile". and proceeded to another location to await the arrival of the BAT Mobile. After being placed in the patrol car, Kranyik remained seated upright for 10-15 minutes. Kranyik felt the handcuffs "tighten up"; this may have been caused by him leaning back against them.
During this 10-15 minute period, Kranyik began to experience pain in his wrists. He complained to Officer Donisi two to three times that his hands were hurting, stating that his hands were "killing him." Kranyik asked Donisi to either remove the handcuffs or handcuff him with his hands in front of him.3 Donisi did not

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1 For the purpose of resolving the instant motion, the Court accepts Kranyik's evidence as true and construes all inferences in Kranyik's favor.
2 There is a dispute concerning whether Officer Donisi used two sets of handcuffs on Kranyik, or only one. Donisi maintains the he used two sets of handcuffs and fastened them together so as to allow Kranuyik more range of movement. Donisi further claims that he "double-locked" both sets of handcuffs in order to prevent them from accidentally tightening. For his part, Kranyik believes Donisi used only one set of handcuffs. This fact dispute is immaterial for the purpose of resolving the instant motion.

3 In his deposition, Officer Donisi testified that he was "very sure" that

Kranyik never complained about the handcuffs. Dkt51 at 26. In a subsequent affidavit supporting the summary judgment motion, Donisi stated that he "did not recall Mr. Kranyik making any complaint...about his handcuffs or wrists." Dkt.36, para. 8, at 2. However, Kranyik's counsel has filed an arrest affidavit, purportedly signed by Donisi, that states: "Mr. Kranyik complained about the handcuffs even though I used 2 sets in order to (illegible) him." Attachment to Dkt. 48.

respond. To relieve the pressure on his wrists, Kranyik ended up lying on his side in the back seat of the patrol car. The BAT Mobile arrived approximately one hour after Kranyik was initially handcuffed. Officer Donisi took Kranyik out of the patrol car and removed the handcuffs. Kranyik again complained to Donisi about the handcuffs. Kranyik remained unhandcuffed for a period of at least 5 minutes. Officer Donisi reapplied the handcuffs, again cuffing Kranyik with his hands behind his back, and returned Kranyik to the patrol car. Kranyik remained there until the arrival of a Sheriff's Department Transportation van. After the van arrived, Donisi's handcuffs were removed, then Kranyik was handcuffed with Sheriff's Department handcuffs. However, this time Kranyik was handcuffed with his hands in front of him. Leg irons were also placed on Kranyik.

Kranyik was then transported in the van to the Sheriff's Department's substation, a trip he estimates took approximately 20 minutes. He arrived at the substation sometime after 1:00 a.m.. The Sherriff's Department's handcuffs were removed after Kranyik entered the substation. Kranyik remained at the substation until approximately 3:00-4:00 a.m., whereupon he was re-handcuffed and transported to another Sheriff's Department facility. That trip took 15-30 minutes. In his affidavit opposing the motion for summary judgment, Kranyik maintains that he was handcuffed, in Officer Donisi's

custody, from 10:43 p.m. to 1"25 a.m., except for the 5 minutes he was unhandcuffed following the arrival of the BAT Mobile.

IV. LIABILITY OF OFFICER DONISI

A. Qualified Immunity Law

The law of qualified immunity is summarized in Lassiter b. Alabama A & M University, Bd. of Trustees, 28 F.2d 1146 (11th Cir. 1994) (en banc):

I. Qualified immunity protects government officials performing discretionary functions from civil trials (and the other burdens of litigation, including discovery) and from liability if their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known. The qualified immunity doctrine means that government agents are not always required to err on the side of caution.

II. That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities. Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit. Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity.

III. For the law to be clearly established to the point that qualified immunity does not apply, the law must have

earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law. Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases.

The most common error we encounter, as a reviewing court, occurs on this point: courts must not permit plaintiffs to discharge their burden by referring to general rules and to the violation of abstract rights. General propositions have little to do with the conceptof qualified immunity. If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. The line is not to be found in abstractions--to act reasonably, to act with probable cause, and so forth-- but in studying how these abstractions have been applied in concrete circumstances. And, as the en banc court recently accepted:

> When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon a precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.
>
> For qualified immunity to be surrendered, pre-existing law must dictate, that is, true compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federallaw in the circumstances.

IV. Because qualified immunity is a doctrine of practical application to real-life situations, courts judge the acts of defendant government officials against the law and facts at the time defendants acted, not by hindsight, based on later events.

V. The subjective intent of government actor defendants plays no part in qualified immunity analysis0 Objective legal reasonableness is the touchstone.

Id. at 1149-50 (emphasis in original: citations, quotations and footnotes omitted). Post-Lassiter, a government actor can properly be denied qualified immunity only in exeptional - perhaps even rare-circumstances. Though Lassiter was not a police excessive force case, it applies equally in that context. Illustrative of Lassiter's impact on section 1983 cases involving alleged excessive force is the Eleventh Circuit's treatment of Harrell v. Decatur County, Ga., 22 F.3d 1570 (1994). opinion vacated on rehearing, 41 F.3d 1494 (11th Cir. 1995). Harrell involved a police shooting in which the suspect was killed. Two members of the appellate panel that initially considered the case reversed the district judge's grant of summary judgment based on qualified immunity. Judge Dubina issued a vigorous dissent. In the interim, Lassiter was decided. On rehearing of harrell, the court vacated its prior opinion in the case and affirmed the district court's grant of summary judgement "for the reason set forth in Judge Dubina's dissenting opinion... and this court's recent decision in Lassiter... which the panel did not have the benefit of at the time we released our opinion in Harrell." Harrell v. Decatur County, Ga., 41 F.3d 1494 (11th cir. 1995).

Procedurally, once a defendant invoking qualified immunity proves that she was acting

within the scope of her discretionary authority when the allegedly wrongful act occurred, the burden shifts to the plaintiff to demonstrate that the defendant violated clearly established law. Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir. 1988); see also, Lassiter, 28 F.3d at 1150 n.2 ("Once the qualified immunity defense is raised, plaintiffs bear the burden of showing that the federal 'rights' allegedly violated were 'clearly established'").

B. Analysis

Donisi has shown that he was acting within the scope of his discretionary authority with respect to the events about which Kranyik complains. See, Rich, 841 F.2d at 1564 (government official proves he acted within the scope of his discretionary authority by showing "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority"). Hence, Kranyik bears the burden of demonstrating that Donisi violated clearly established law. Id. at 1563-64. To meet that burden, Kranyik must show that existing law would have compelled every like-situated, reasonable government actor to conclude that what Donisi was doing, and did violated federal law under the particular circumstances in which he found himself. Lassiter, 28 F.3d at 1150. In other words, accepting Kranyik's version of events, Kranyik must show that under the law that existed at the time of the incident, every like-situated, reasonable police officer would have been compelled to conclude that in the face of Kranyik's complaints, the officer was violating federal law by not removing the

handcuffs for more than five minutes or by not rehandcuffing Kranyik with his hands in front of him.

Kranyik has failed to make the necessary showing. Kranyik has not identified any materially similar pre-existing decisional authority that would have compelled every reasonable officer in Donisi's place to conclude that he or she was violating federal law.

Kranyik cites one handcuffing case, Walton b. City of Southfield, 995 F.2d 1331(6th Cir. 1993). However, that case is unpersuasive. For one thing, Walton does not represent pre-existing law. Walton was decided after Kranyik's arrest. For another, Walton has limited qualified immunity precedential value because it was decided by a Court of Appeals other than the Eleventh Circuit. Finally, Walton is materially distinguishable from the instant case. Walton involved a non-intoxicated arrestee who suffered a pre-existing medical condition that made handcuffing painful, and who notified the officers of that condition before she was handcuffed. See Nemeckay v. Rule,894 F. Supp. 310,318 n.4 (D. Mich. 1995) (recognizing these distinctions and noting that Walton involved the issue of the use of handcuffs in the first instance, "not simply a failure to remove handcuffs after they had been legitimately applied").

In sum, this is not one of those exceptional cases in which a government actor must be stripped of qualified immunity. The motion for summary judgment is due to be granted insofar as it raises qualified immunity on behalf of Officer Donisi.

V. LIABILITY OF THE CITY

A. Applicable Law

The standard for imposing section 1983 liability on a municipality is succinctly summarized in Gilmere v. City of Atlanta, Ga. 737 F.2d 894 (11th Cir. 1984), cert. denied, 476 u.s. 1115 (1986). Monell v. Department of Social Services [,436 U.S. 658 (1978)] holds that a municipality can be sued for damages under 42 U.S.C. Section 1983... when "the action that is alleged to be unconstitutional implements or execute a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or is "visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision making channels." Monell, 436 U.S. at 690-91, rev'g in part Monroe v. Pape, 365 U.S. 167 (1961). Thus, Monell imposes liability on municipalities for deprivations of constitutional rights visited pursuant to municipal policy, whether that policy is officially promulgated or authorized by custom. The official policy or custom "must be 'the moving force of the constitutional violation' in order to establish liability of a government body under section 1983." Polk County v. Dodson, 454 U.S.312 (1981). See Williams v. City of Valdosta, 689 F.2d 964,969 (11th Cir. 1982). citing Schneider v. City of Atlanta,628 F.2d 915, 920 (5th Cir. 1980); see also Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982).Gilmere, 737 F.2d at 901 (parallel Supreme Court citations and Footnote omitted).

V. Analysis

It appears that Kranyik attributes his alleged constitutional injury to the following

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"policies or customs" of the City: (1) the alleged failure to train and supervise its officers concerning the use of handcuffs; (2) the alleged policy of allowing officers to use their personally-owned handcuffs; and (3) the alleged policy of utilizing the Sheriff's Department's BAT Mobile to test arrestees for intoxication, rather than having such tests performed at the City's police station.

Concerning the first point, it is undisputed that Officer Donisi did in fact receive training in the use of handcuffs during his police academy training at Brevard Community College. Dkt.51 at 17: Dkt.36, para 10, at 2. Chief Lock has testified that he is aware that handcuffing is taught to prospective police officers at the police academy. Dkt.37, para.6, at 2. It is immaterial that the city did not provide the training; what is material is that Kranyik has not presented any evidence that a lack of training or supervision was the "moving force" behind the alleged constitutional deprivation.

Concerning Kranyik's allegation that the City allowed officers to use their own handcuffs, Kranyik has similarly failed to show that this "policy" caused the constitutional injury alleged. More specifically, Kranyik has not presented any evidence that there was anything abnormally injurious about the particular handcuffs Donisi used on Kranyik, or that any other type of restraints would have been less injuries. Although Kranyik complains about Donisi's failure to use plastic-tie type restraints instead of handcuffs, he has offered no evidence that such restraints would have been less injurious than the handcuffs that were used.

Kranyik has also not presented any evidence that the City's "policy" of using the

Sheriff's Department's BAT Mobile for sobriety testing was the moving force behind the alleged constitutional violation. By way of background, Donisi testified that he called for the BAT Mobile rather than taking Kranyik to the City police station for testing. Donisi did this despite the fact that there was an operating Intoxilyzer at the City's police station, which was located approximately 3-4 miles from the scene of the arrest. Dkt.51 at 27-28. When questioned concerning the reason he elected to use the Sheriff's BAT Mobile because if a case went to trial, it would not "tie up any of the local people." Dkt.51 at 27.

Kranyik suggests that the decision to use the BAT Mobile resulted in Kranyik remaining handcuffed for longer than he would have had he been taken to the police station for sobriety testing. However, that conclusion rests on speculation. Kranyik has not presented evidence that he would have been handcuffed for a shorter period of time had he been transported to the police station.4 More importantly, it is the failure to _____

4There is no evidence that the City had a breath testing machine operator on duty that evening, or, if it did, that the operator was not otherwise occupied. There is also no evidence concerning what holding facilities for arrestees were available at the police station, and whether, and for how long, arrestees typically remained handcuffed following their arrival at the police station.

remove or loosen the handcuffs that is truly at issue in this case. Assuming that the handcuffs should have been removed or adjusted, there was nothing about the City's policy of using the BAT Mobile that prevented Donisi from removing or loosening the handcuffs while awaiting the arrival of the BAT Mobile and, later, the Sheriff's transportation van.

Finally, assuming that Kranyik complained to Officer Donisi about the handcuffs and that Donisi's failure to remove them constituted excessive force, there is evidence that the City had a policy that, if followed, would have prevented the constitutional violation at issue. In that regard, Donisi testified in substance that the City's procedure was that if an arrestee complained about handcuffs, the officer was to call an ambulance, have the arrestee checked, and obtain a medical release. Dkt. 51 at 26-27.

Based on the foregoing, the Court determines that Kranyik has failed to present sufficient "policy or custom" evidence to preclude summary judgment in favor of the City.

VI. LIABILITY OF CHIEF LOCK

Kranyik has sued Chief Lock in his official capacity. Monell's "policy or custom" standard of liability applies to officials sued in their official capacity. Colvin v. McDougall, 62 F.3d 1316, 1318 (11th Cir. 1995). Further, there is no respondent superior liability under section 1983. Harris v. Ostrout, 65 F.3d 912, 917 (11th cir.1995) (citing Monell, 436 U.S. at 690-92). Accordingly, Chief Lock may be held liable only if he "either personally participated in the acts comprising the alleged constitutional violation or instigated or adopted a policy that violated [Kranyik's] constitutional rights." Adams v. Poag, 61 F.3d 1537, 1544 (11th Cir. 1995).

As previously discussed, Kranyik has produced insufficient evidence that any policy of the City was the moving force behind the alleged constitutional violation of which he complains. Kranyik has similarly failed to

produce evidence that he was injured as a result of any policy of Chief Lock. Further, Chief Lock has stated under oath that he did not personally participate in Kranyik's arrest and handcuffing, and that he was not even present at the scene of the arrest. See Dkt. 37, para.4, at 2. Kranyik has not produced any evidence controverting these statements. Accordingly, Chief Lock is entitled to summary judgment.

VII. CONCLUSION

Based on the foregoing, the Court determines that the Defendants are entitled to summary judgment. Accordingly, it is ORDERED as follows:

1. the "Motion for Summary Judgment by Defendants, City of West Melbourne, Florida, Brain Lock and Paolo donisi" (Dkt.33), filed December 29, 1995, is GRANTED.

2. The Clerk is directed to enter a final judgment providing that the Plaintiff, Andrew Martin Kranyik, shall take nothing on his claims against the Defendants, City of West Melbourne, Florida, Brian Lock, and Paolo Donisi, and further providing that the Defendants shall recover their costs of action.

3. Any other pending motions are denied as moot.

4. The Clerk shall close the file.

DONE AND ORDERED in chambers in Orlando, Florida, this 22nd of April 1996.

ANNE C. CONWAY
United States District Judge

Copies to : Counsel of Record
Any Unrepresented Parties
Courtroom Deputy
Judge Conway's Chambers

Supreme Court, U.S.
FILED
JUL 11 1997
CLERK

No. 96-2019

In The

Supreme Court of the United States

October Term, 1996

ANDREW MARTIN KRANYIK,

Plaintiff,

v.

CITY OF WEST MELBOURNE,
BRIAN LOCK, and PAOLO DONISI,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where excessive force by a police officer is alleged in a Section 1983 suit, is the standard for qualified immunity that the exact fact pattern must have been determined in an Eleventh Circuit case to be unconstitutional in order for the Section 1983 claim to survive a qualified immunity summary judgment motion?

2. May a single act be indicative of a policy or practice that gives rise to Section 1983 liability?

PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, THE CITY OF WEST MELBOURNE, BRIAN LOCK, and PAOLO DONISI, respectfully object to and oppose Petitioner's, ANDREW KRANYIK's, Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the Appendix filed with Petitioner's Petition for Writ of Certiorari ("App.") at 1a. The unreported decision of the District Court in this case is reproduced in that same Appendix at 2a.

STATE OF JURISDICTION

The Court of Appeals for the Eleventh Circuit entered its judgment on December 27, 1996. Petitioner invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of 42 U.S.C. § 1983 is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State Territory or District of Columbia, subjects,

> or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

STATEMENT OF THE CASE

Respondents, City of West Melbourne, Brian Lock and Paolo Donisi, disagree with the following assertions in Petitioner Kranyik's Statement of the Case which contains absolutely no record citations. Record references will be the same as the designations used in the Eleventh Circuit record. Respondents disagree with Petitioner's assertion that he was handcuffed behind his back by these Respondents approximately three hours before arrival of a mobile testing unit. The record does not support that contention. Petitioner was arrested at 10:53 p.m. (R1-51-23). The breath alcohol testing unit arrived at 11:35 p.m. and Petitioner Kranyik would have been released from handcuffs before then (R1-51-pp.24-26). The Sheriff's van which transported Petitioner Kranyik arrived shortly after 12:37 a.m. (R1-51-25). Petitioner Kranyik was released from handcuffs when the Sheriff's Batmobile arrived and when Sheriff's deputies took him in the Sheriff's van (R1-51-25). Petitioner Kranyik agreed that the handcuffs were removed 10 or 15 minutes while Petitioner Kranyik was involved with the Sheriff's Batmobile (R1-42-124). Respondent Donisi released those handcuffs (R1-42-77). Handcuffs of nonparty Sheriff's

deputies, not handcuffs of the Respondents, were placed by nonparty deputies on Petitioner Kranyik after he refused breathalizer testing. These handcuffs of others were on about the same length of time as Respondent Donisi's (R1-42-133). Petitioner Kranyik arrived at the Sheriff's jail facility after 1:00 a.m. in the Sheriff's custody, the Sheriff's van and shackled in the Sheriff's handcuffs and leg irons (R1-42-pp.126-128, 129). The record shows that the Petitioner was handcuffed by Officer Donisi less than 42 minutes initially before he was placed in the Sheriff's handcuffs.

The following additional facts regarding the misstatements of the Petitioner should be considered by the Court in ruling upon the propriety of this Writ:

With regard to the contention that alternative measures to conduct sobriety testing existed, Mr. Kranyik refused to participate in roadside sobriety tests because he was concerned he could not pass them due to earlier alcohol consumption (R1-42-92). Kranyik did not dispute having dilated eyes, watery or glassy eyes, slurring of speech or speech which was thick-tongued, that his face was flushed, that he stumbled or that there was an odor of alcohol on his breath (R1-42-pp.158-159). On the night in question, Petitioner Kranyik admitted drinking two beers and three large Canadian Clubs with ginger ale (R1-42-64).

Respondent Donisi used two sets of handcuffs to handcuff Mr. Kranyik in order to allow him more room between his arms (R1-51-20). Respondent Donisi released Petitioner Kranyik from handcuffs on at least two occasions and observed no cuts or lacerations on Respondent's wrists (R1-51-31). Petitioner Kranyik stated that

the Sheriff's handcuffs also hurt his wrists and the Sheriff's handcuffs were on about the same length of time as Respondent Donisi's (R1-42-pp.126-128, 133). The Sheriff's handcuffs were placed in the area between the wrist bone and the back of each hand (R1-42-134). Petitioner Kranyik admitted there were no indentations on his wrists after the use of Respondent Donisi's handcuffs (R1-42-131). Petitioner Kranyik also admits that he did not point out anything wrong with either of his wrists or either of his hands while he was at the jail facility following his arrest (R1-42-130). The record includes both an audiotape and a videotape of the process of Mr. Kranyik's arrest (R1-38) (attached to the Notice of Filing). The booking photographs taken at the jail show no cuts or lacerations on either wrist of Petitioner Kranyik (R1-34-Exhibit "B"). The jail booking sheet shows no indication of any injury to either of Respondents' wrists (R1-34-Exhibit "A").

Additionally, the record below established that Respondent Donisi received training regarding the handcuffing process during the police academy (R1-51-pp.17-18). It was the policy of the City of West Melbourne to handcuff arrestees behind their back (R1-51-18). Respondent Chief Lock, in his affidavit, testified that it was the customary practice of every police agency with whom he was familiar, literally dozens, to handcuff arrestees behind their back (R1-37-2). Chief Lock established policies at the City of West Melbourne which permitted use of only reasonable force during the course of an arrest and he was familiar that the police academy taught arrest techniques, handcuffing techniques and the procedure whereby arrestees were to be handcuffed

behind their back (R1-37-2). Respondent Lock cautioned officers to avoid using excessive force during the course of an arrest (R1-37-2). Respondent Lock was also aware that police academies train and instruct officers to avoid use of excessive force during an arrest (R1-37-2,3). Respondent Lock did not personally participate in the arrest and was not present at the scene of the arrest of Petitioner Kranyik (R1-37-2).

With regard to his treating physicians, Dr. Woodward admitted that the transmission work in which Petitioner Kranyik engages involves repetitive forceful twisting which can itself cause carpal tunnel problems (R1-41-pp.8-10). Dr. Woodward could not tell when Petitioner Kranyik's alleged carpal tunnel syndrome occurred (R1-41-pp.9-10). Dr. Woodward felt that given Petitioner's age, weight and type of work, the Petitioner would have some soreness in his wrists even before this arrest (R1-41-11). Dr. Woodward admitted that being overweight can be a factor in carpal tunnel syndrome cases (R1-41-13). Mr. Kraynik was overweight. He admitted that the causation of carpal tunnel syndrome is a subject of considerable debate (R1-41-12). Both Dr. Woodward and Dr. Weiss admitted that they saw no evidence of bruising, lacerations or scars on either of Petitioner Kranyik's wrists (R1-41-34; R1-40-7). Dr. Weiss, another of the Petitioner's treating physicians, agreed that repetitive use of hands by a transmission mechanic can cause carpal tunnel syndrome as a result of work related activities (R1-40-17). Tinel's medical test for the wrist was generally negative for both of Petitioner's wrists (R1-40-20).

Dr. Weiss observed a normal range of motion in both wrists subsequent to Petitioner's arrest (R1-40-22).

REASONS FOR DENYING THE WRIT

United States Supreme Court Rule 10, although neither controlling nor fully measuring the court's discretion, indicates a number of factors governing review on certiorari. Apparently, the Petitioner seeks review under Rule 10(c) on the alleged basis that the Eleventh Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court. It is quite noteworthy that the last sentence of Rule 10 states that certiorari is rarely granted where the asserted error consists of misapplication of a properly stated rule of law. The issue presented by Petitioner is not an important federal question and no conflict exists.

Although Petitioner relies heavily on *Graham v. Connor*, 490 U.S. 386, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989), the United States Supreme Court stated in footnote 12 at 104 L.Ed.2d 457, "since no claim of qualified immunity has been raised in this case, however, we express no view on its proper application in excessive force cases that arise under the Fourth Amendment." It thus appears that *Graham* did not decide this issue in a way that conflicts with Eleventh Circuit cases since qualified immunity issues were not before the court in *Graham*.

Petitioner erroneously claims that the Eleventh Circuit simply grants summary judgment on qualified immunity grounds unless the exact fact pattern has been

determined to be unconstitutional. That certainly misstates the impact of *Lassiter v. Alabama A&M University, Board of Trustees*, 28 F.3d 1146 (11th Cir. 1994) (en banc) and the rule it summarized at 1149-50. There, the Eleventh Circuit made it clear, discussing earlier precedents, that the facts of prior decided cases need not be the same as the facts of the immediate case but they need to be materially similar. That statement of the law is clearly in harmony with United States Supreme Court precedence and no conflict exists. As the last sentence of Supreme Court Rule 10 states, misapplication of a properly stated rule of law is rarely a proper basis for writ of certiorari. This writ should be denied.

I.

THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE SUMMARY JUDGMENT FOR RESPONDENTS ON QUALIFIED IMMUNITY GROUNDS.

The well reasoned District Court order does not conflict with United States Supreme Court precedents. *Graham v. Connor*, 490 U.S. 386, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989) made it clear in Footnote 12 at 104 L.Ed.2d 457 that qualified immunity was not raised in the *Graham* decision and the Supreme Court expressed no view on its application in excessive force cases arising under the Fourth Amendment. If the Supreme Court did not consider the issue, it is illogical to cite *Graham* as conflict authority.

Petitioner also cites *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed.2d 271, 106 S.Ct. 1092 (1986) as alleged conflict

authority. *Malley* held that an officer can get qualified immunity for objectively reasonable actions even where officers of reasonable competence could disagree with the action taken. *Malley* held that an individual can get qualified immunity unless a request for a warrant so lacks indicia of probable cause that no reasonably competent officer could conclude that a warrant should issue. *Malley* certainly does not support a contention that the district court order somehow conflicted with Supreme Court precedent. At page 7 of the Petition for Writ of Certiorari, Kranyik claims that the basis for appeal was an alleged extended handcuffing "without at least removing the handcuffs periodically." At page 8, Petitioner again misrepresents the record and contends that Respondent Donisi handcuffed the plaintiff behind his back for more than three hours. There are no record citations to support that contention. On the contrary, the record clearly refutes Petitioner's contentions in this regard. Petitioner was arrested at 10:53 p.m. (R1-51-23). The breath alcohol testing unit arrived at 11:35 p.m. and Petitioner would have been released from handcuffs before then (R1-51-pp.24-26). Petitioner agreed that the handcuffs were removed 10 or 15 minutes while he was involved with the Batmobile (R1-42-124). Respondent Donisi released those handcuffs (R1-42-77). Other non-party sheriff's deputies then placed Petitioner in handcuffs after he refused the breathalizer (R1-42-126-128, 129, 133). Petitioner agreed that the handcuffs of non-party sheriff's deputies were on about the same length of time as Officer Donisi's handcuffs (R1-42-133). The sheriff's handcuffs were placed in the same area between the wrist bone and the back of each hand (R1-42-134). Petitioner admitted there were no

indentations on his wrists after use of Officer Donisi's handcuffs (R1-42-131). Petitioner did not point out anything wrong with either of his wrists or hands while he was at the jail and did not request medical treatment at the jail (R1-42-130). The booking photographs taken at the jail of Petitioner show no cuts or lacerations on either of his wrists (R1-34-Exhibit "B"). The jail booking sheet shows no indication of injury to either of Petitioner's wrists (R1-34-Exhibit "A").

It therefore clearly appears from the record on appeal that Respondent Donisi did exactly what Petitioner claims should have been done. Petitioner does not claim he should not have been handcuffed at all. The record clearly establishes that Officer Donisi removed the handcuffs periodically and that the remainder of the handcuffing after Petitioner refused the breathalizer examination was done by non-party sheriff's deputies, not Respondent Donisi.

Petitioner cites *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987), a Fourth Amendment case holding individuals were entitled to qualified immunity. At 97 L.Ed.2d 523, the United States Supreme Court stated that the unlawfulness of the challenged action must be apparent in light of preexisting law. The court also there stated that qualified immunity protects all but the plainly incompetent. *Anderson* stated that qualified immunity reflects a balance struck across the board and represents the norm, rather than the exception. *Anderson* at 97 L.Ed.2d 532, 534. *Anderson* clearly requires that the right allegedly violated must have been clearly established in a more particularized sense so that the contours of the right are sufficiently clear to a reasonable officer

that he would understand his actions violate this clearly established constitutional right. *Anderson*, 97 L.Ed.2d 531. At 97 L.Ed.2d 530, the Supreme Court warned against use of overly general concepts as a means of defeating qualified immunity. At 97 L.Ed.2d 532-533, *Anderson* rejected complicating qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. The Supreme Court was particularly concerned about giving officials enough assurance to allow them to perform their valuable public services. It seems that *Anderson* stands for the proposition that a single qualified immunity rule should be applied across the board – the standards regarding qualified immunity should not change simply because a Fourth Amendment claim is being made.

Fourth Amendment cases have not thus far set a special standard for qualified immunity analysis. *Malley, supra*, certainly did not establish a separate analytical framework. Qualified immunity was given to officials who were alleged to have violated the Fourth Amendment in *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985). There is absolutely no reason to treat excessive force Fourth Amendment Claims different than other varieties of Fourth Amendment claims. *Tennessee v. Garner*, 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985) is not really a qualified immunity case since the individuals had been dismissed as indicated at 85 L.Ed.2d 16.

Telfair v. Gilberg, 868 F.Supp. 1396 (S.D. Ga. 1994), cited by the Petitioner, was affirmed by the Eleventh Circuit at 87 F.3d 1330. The lower court decision held that

there was a material issue of fact which prevented application of qualified immunity. *Telfair* can provide no comfort to the Petitioner since there is absolutely no record evidence indicating that the Petitioner is physically handicapped, was choked or even knocked over. The page cited by Petitioner, 1403, does not deal with the Fourth Amendment reasonableness standard, but rather discusses Eighth Amendment standards and Fourteenth Amendment standards to determine if the rights were clearly established.

Sweatt v. Bailey, 876 F.Supp. 1571 (M.D. Ala. 1995) was decided after Petitioner's 1993 arrest. The court in *Sweatt* concluded that the police chief was entitled to qualified immunity and an officer who unjustifiedly beat an arrestee while the arrestee was talking on the telephone was not entitled to qualified immunity. No such beating took place involving Petitioner Kranyik. *Walton v. City of Southfield*, 995 F.2d 1331 (6th Cir. 1993) was not only decided after Petitioner's arrest but is a case from the Sixth Circuit. *Walton* did not involve an intoxicated arrestee such as Petitioner Kranyik. *Walton* involved an arrestee having an objective arm injury before the arrest who, before the arrest, informed the officer that her arm was previously injured. Petitioner Kranyik claims no pre-existing injury. As pointed out by Judge Conway in her well reasoned opinion in the instant case (R2-65-pp.8-9), *Walton* involved an issue of using handcuffs in the first instance, not simply a failure to remove handcuffs after they were lawfully applied. Even Petitioner Kranyik agrees the handcuffs in this instance were lawfully applied by Respondent Donisi. See Petition for Writ of Certiorari, pp.7-8.

In the Petition for Writ of Certiorari, Petitioner confuses case law regarding the threshold issue of qualified immunity with principles pertaining to ultimate liability under 42 U.S.C. § 1983 and the reasonableness standard of the Fourth Amendment. It seems from the petition that Kranyik is not challenging the summary judgment in favor of Respondent Chief Lock. Many of the cases cited simply do not really focus on the issue of qualified immunity. For example, *Samples On Behalf of Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988) does not really focus on the issue of qualified immunity. Petitioner simply has failed to demonstrate that any respondent violated clearly established law. *Rich v. Dollar*, 841 F.2d 1558, 1563-64 (11th Cir. 1988); *Lassiter*, 28 F.3d at 1150 n. 3.

Boyd v. Angarone, 729 F.Supp. 1194 (M.D. Ill. 1990) granted summary judgment in favor of the defendants. In *Boyd*, officers conducting an arrest were entitled to qualified immunity despite the fact that the plaintiff there alleged a bruised and swollen left wrist and pain in the back of his neck as a result of being handcuffed with his hands behind him. Although it is not particularly a qualified immunity case, the court in *Swanson v. Fields*, 814 F.Supp. 1007 (D. Kan. 1993), *aff'd*, 13 F.3d 407 (10th Cir. 1993) held that complaints of minor pain and discomfort failed to sustain any inference of inordinate force being used during the arrest. There, the plaintiff complained of tight handcuffs and pain in his neck after he was grabbed by police officers, forced against a vehicle and handcuffed. *Swanson* granted summary judgment for individual defendants. *Alm v. Moreth*, 694 F.Supp. 1322, 1324-25 (M.D. Ill., E.D. 1988) held that an officer was entitled to qualified immunity when he handcuffed an individual

during an arrest whose wrist had previous surgery and was not completely healed. There, Alm informed Moreth before being handcuffed that his wrist had not completely healed and would cause him pain. Petitioner Kranyik does not present an egregious conduct case and there is no reason from a public policy standpoint to accept certiorari in this matter where summary judgment was properly granted.

II.

NO SUFFICIENT "SINGLE ACT" POLICY OR CUSTOM EVIDENCE WAS PRESENTED WHICH WOULD IMPOSE LIABILITY ON EITHER THE CITY OR CHIEF LOCK UNDER 42 U.S.C. § 1983.

A "single act" policy liability theory is inapplicable to the facts at bar and is not supported by the record. *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989) involves much more egregious facts than Petitioner's case. Further, in *Parker*, judgments against the County and the Sheriff were vacated and the case was remanded for a new trial. There is no evidence that Officer Donisi is a final decision maker and Officer Donisi's actions cannot constitute official policy of either the City of West Melbourne or Respondent Lock. See *Popham v. City of Talladega*, 908 F.2d 1561 (11th Cir. 1990). In *Popham*, a decision by the mayor to leave a guard position unfilled did not create a policy to maintain an inadequately staffed jail. The record does not establish any unconstitutional policy. Further, the record does not even establish that Respondent Lock is the final decision maker regarding the training of municipal employees.

Respondent Donisi did in fact receive training in the use of handcuffs (R2-65-10). Respondent Donisi was instructed in the use of handcuffs during his police academy training at Brevard Community College (R1-51-pp.17-18). Chief Lock was aware of and relied upon the fact that handcuffing procedures were taught to police officers at the police academies (R1-37-2). Petitioner Kranyik has presented no evidence indicating that any lack of training or supervision was the moving force behind any alleged constitutional deprivation and no constitutional deprivation has been shown. *Gilmere v. City of Atlanta, Georgia*, 737 F.2d 894, 901 (11th Cir. 1984), *cert. den.* 476 U.S. 1115 (1986); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

There was no evidence showing how allowing officers to use their own handcuffs caused any constitutional injury (R2-65-pp.10-12). There has been no showing that Officer Donisi's handcuffs were different in kind or nature from those generally used by other police agencies. There was no proof that these handcuffs were particularly injurious. Further, there was no proof that any other type of restraint would have been less injurious. There was no evidence that plastic tie restraints would have been any less injurious than handcuffs. There was no evidence that Petitioner would have been handcuffed a shorter length of time if he had been transported to the City of West Melbourne police station. There was no evidence that the City of West Melbourne had a breath testing machine operator on duty that evening or that any such operator was not otherwise occupied. There was no evidence concerning what holding facilities were available at the City of West Melbourne police station. There

was no evidence showing how long arrestees typically remained handcuffed following their arrival at the City of West Melbourne police station.

There was, however, evidence that the City had a policy, known by Officer Donisi, that police officers were to call an ambulance if the arrestee complained about handcuffs (R1-51-27). Certainly that policy satisfied constitutional requirements. The City of West Melbourne is a small city and the Sheriff's Batmobile was properly used in order not to tie up all of the City's resources (R1-51-27). Respondent Lock established policies which permitted use of only reasonable force during the course of an arrest (R1-37-2). Respondent Lock encouraged police officers to be mindful of the physical safety of arrestees (R1-37-2). Officers were taught by the police academy to avoid use of excessive force during the course of an arrest (R1-37-3).

Hindsight is certainly inappropriate in judging what a reasonable person in the Respondent's position would have done. *Singleton v. McDougall*, 932 F.Supp. 1386 (M.D. Fla. 1996). The custom or policy standard of liability established by *Monell v. New York Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1977) applies to officials sued in their official capacity. *Colvin v. McDougall*, 62 F.3d 1316, 1318 (11th Cir. 1995). No respondeat superior liability exists under § 1983. *Harris v. Osterout*, 65 F.3d 912, 917 (11th Cir. 1995). Respondent Lock did not personally participate in Kranyik's arrest or handcuffing (R1-37-2) and did not establish any policy which violated Petitioner Kranyik's constitutional rights. He was not present at the scene of the arrest and has no liability. *Adams v. Poag*, 61 F.3d 1537,

1544 (11th Cir. 1995), *reh. den.*, 70 F.3d 1287 (11th Cir. 1995). Since the City has been named as a party, neither Respondent Lock nor Respondent Donisi should have been named in their official capacities. *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. Fla. 1991).

There is no showing in this record that any failure to train amounted to deliberate indifference to the rights of persons with whom police officers can be expected to come into contact. *Canton*, 489 U.S. at 388, 109 S.Ct. at 1204. To be actionable, the failure to train must reflect a deliberate or conscious choice and the deficiency in training must be closely related to the ultimate injury. *Canton* at 489 U.S. 389, 391, 109 S.Ct. at 1205, 1206. The need for more or different training must be so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that policymakers are deliberately indifferent to the need for training. *Canton* at 489 U.S. 390, 109 S.Ct. 1205. No such deficiencies have been shown in this record. The policies which the record establish show that officers were encouraged to use only reasonable force and medical attention should be given when complaints are made after handcuffing. Mere negligence is not sufficient to establish a violation of petitioner's constitutional rights. *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 88 L.Ed.2d 677, 106 S.Ct. 668 (1986). No unconstitutional policy, single act or otherwise, has been shown and this writ should be refused.

Recently the Supreme Court in *County Commissioners of Bryan County, Oklahoma v. Brown*, 10 FLW Fed. S405 (U.S. Supreme Court decided 4/28/97) rejected liability under a single act policy theory involving the decision to

fire a sheriff's deputy. At page 11 of this decision, the Supreme Court emphasized the importance of applying stringent culpability and causation requirements in "single act" cases. Petitioner has presented no evidence that either the City of West Melbourne or Chief Lock had a conscious disregard for a high risk that Officer Donisi would use excessive force in violation of Petitioner's constitutional rights. The pages of the record cited by Respondents above prove undisputedly the complete contrary. There is no evidence of improper training or supervision, no evidence of culpability and no evidence of causation. No unconstitutional policy, single act or otherwise, has been shown and this Writ should be refused.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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